No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

A. Respondents lack Article III standing 1
B. Respondents' arbitrary-and-capricious claims are not reviewable under the APA 5
C. The Secretary's decision was not arbitrary and capricious 10
D. The Secretary's stated rationale cannot be dismissed as pretextual 19
E. Section 6(c) of the Census Act does not provide a basis to set aside the Secretary's decision 21
F. Section 141(f) of the Census Act does not provide a basis to set aside the Secretary's decision 22
G. The district court erred in authorizing discovery outside the administrative record 23
H. The Secretary's decision did not violate the Enumeration Clause 24

TABLE OF AUTHORITIES

Cases:

Bell v. *New Jersey*, 461 U.S. 773 (1983) 9
Bennett v. *Spear*, 520 U.S. 154 (1997) 4
Block v. *Meese*, 793 F.2d 1303 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986) 3
Bowen v. *American Hosp. Ass'n*, 476 U.S. 610 (1986) 20
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 20
California v. *Ross*, 358 F. Supp. 3d 965 (N.D. Cal. 2019), petition for cert. before judgment pending, No. 18-1214 (Mar. 18, 2019) 25
Camreta v. *Greene*, 563 U.S. 692 (2011) 23
Chappell v. *Wallace*, 462 U.S. 296 (1983) 9

Cases—Continued: Page

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 23
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 2
Clapper v. *Amnesty Int'l USA*, 568 U.S. 398 (2013) 2, 3, 26
Department of Commerce v. *United States House of Representatives*, 525 U.S. 316 (1999) 3, 4
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 4, 9
Heckler v. *Chaney*, 470 U.S. 821 (1985) 8
Judulang v. *Holder*, 565 U.S. 42 (2011) 20
McConnell v. *FEC*, 540 U.S. 93 (2003) 2, 5
Meese v. *Keene*, 481 U.S. 465 (1987) 3
Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 10, 12, 13, 15, 19, 27
NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 3
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 2
Sierra Club v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981) 20
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 4
Spencer v. *Kemna*, 523 U.S. 1 (1998) 2
Thornburg v. *Gingles*, 478 U.S. 30 (1982) 11
Tucker v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir. 1992) 7
United States v. *Armstrong*, 517 U.S. 456 (1996) 2
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 23
Utah v. *Evans*, 536 U.S. 452 (2002) 3, 4
Webster v. *Doe*, 486 U.S. 592 (1988) 8
Wisconsin v. *New York*, 517 U.S. 1 (1996) 5, 7, 9, 15, 24, 25

Constitution and statutes: Page

U.S. Const.:
Art. I, § 2, Cl. 3 (Enumeration Clause) 24, 25, 26
Art. III 5
Amend. I 3
Act of Mar. 1, 1790, ch. II, § 1, 1 Stat. 101 24
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
5 U.S.C. 701(a)(2) 5
5 U.S.C. 706(2)(A) 5
Census Act, 13 U.S.C. 1 *et seq.* 5
13 U.S.C. 5 ..... 6, 8
13 U.S.C. 6(c) 8, 21, 22
13 U.S.C. 9(a) 26
13 U.S.C. 141(a) 5, 6, 8, 9
13 U.S.C. 141(f) 22
13 U.S.C. 195 8
13 U.S.C. 221 26
Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, sec. 205(a)(1), 79 Stat. 30 9
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 26
Voting Rights Act of 1965, 52 U.S.C. 10301 *et seq.* (Supp. V 2017) 10
§ 2, 79 Stat 437 11
10 U.S.C. 1552(a) (1982) 9

Miscellaneous:

H.R. Rep. No. 246, 93d Cong., 1st Sess. (1973) 8

Miscellaneous—Continued: Page

Bureau of the Census, U.S. Dep't of Commerce, *Notice of Required Information for the 1960 Census of Population and Housing*, https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-documentation/questionnaires/1960censusquestionnaire-2.pdf (last visited Apr. 15, 2019) 6

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REPLY BRIEF FOR THE PETITIONERS

A. Respondents Lack Article III Standing

The government has explained (Gov't Br. 17-21) that respondents' alleged injuries are not fairly traceable to the citizenship question because they depend on unlawful third-party action that is itself driven by speculative fears that the government will act unlawfully in the future (by misusing census responses). Such speculative fears, which would not give the third parties themselves standing, cannot be bootstrapped through an unlawful refusal to answer the citizenship question to confer standing on respondents. See *id.* at 19-20. Tellingly, respondents have no answer to this simple point.

Instead, respondents cite several cases that purportedly found standing "based on third parties' irrational or illegal responses to challenged governmental action." NY Br. 24; see ACLU Br. 21-22. But none of those cases

involved unlawful third-party action driven by speculative fears of future unlawful governmental action. This Court has never endorsed such a capacious theory of standing. To the contrary, it has consistently refused to find standing when the asserted injuries—even if they actually occur—are based on speculation of future unlawful action. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003); *Spencer* v. *Kemna*, 523 U.S. 1, 15 (1998); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974); see also *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (presumption of regularity).

Amnesty International is instructive. The plaintiffs there argued they had standing to challenge the constitutionality of a statute authorizing certain foreign surveillance in part because "the risk of surveillance under [the statute] is so substantial that they have been forced to take costly and burdensome measures" in response. 568 U.S. at 407. Acknowledging that the plaintiffs had, in fact, undertaken the costly measures, this Court nevertheless found those injuries not fairly traceable to the government because they were the result of plaintiffs' own independent decisions based on a "highly speculative" fear of future governmental action. *Id.* at 410; see *id.* at 415-416. Respondents' bid for standing here suffers from the same flaw: their injuries would be the result of third parties' independent decisions to illegally refuse to answer the census based on a highly speculative fear that the government also will break the law in the future. Indeed, the *Amnesty International* plaintiffs' *own* such fears were insufficient to support stand-

ing; it follows *a fortiori* that *someone else's* unreasonable fears are insufficient to support respondents' standing.

Respondents' cases do not suggest otherwise. In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the NAACP's injury was the disclosure of its private membership information by direct governmental compulsion. *Id.* at 453-454. There is no such direct injury here. And any injuries inflicted on NAACP members by third parties (whether lawfully or unlawfully) would have been directly facilitated by the governmentally compelled disclosure. See *id.* at 462. Here, by contrast, the government does not facilitate—to the contrary, it makes unlawful—any refusal to answer the census. At all events, the challenged governmental action in *NAACP* chilled the right of free association, see *id.* at 460-463, and this Court has recognized that standing requirements are somewhat relaxed in that context, see *Meese* v. *Keene*, 481 U.S. 465, 473 (1987); cf. *Amnesty Int'l*, 568 U.S. at 420. Similarly, *Block* v. *Meese*, 793 F.2d 1303 (D.C. Cir.) (Scalia, J.), cert. denied, 478 U.S. 1021 (1986)—another First Amendment case—involved direct governmental regulation of the plaintiff film distributor and no allegation at all of unlawful third-party action, much less unlawful third-party action caused by speculative fears of future unlawful governmental action. *Id.* at 1307-1309.

Respondents' reliance (NY Br. 25; ACLU Br. 21) on *Utah* v. *Evans*, 536 U.S. 452 (2002), and *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999), also is misplaced. The governmental actions at issue in those cases—hot-deck imputation in *Evans*, certain statistical sampling methods in *House*

of Representatives—directly modified the census enumeration tallies and thus directly caused the plaintiffs' alleged injuries. See *Evans*, 536 U.S. at 457-458; *House of Representatives*, 525 U.S. at 324-326. Here, by contrast, the link between the challenged governmental action (asking the citizenship question) and respondents' alleged injuries not only is indirect but requires third parties to unlawfully refuse to return the census form, and to do so out of speculative fear that the government will act unlawfully in the future by disclosing their answers. That speculation-fueled intervening step is not "fairly" attributable or traceable to the Secretary of Commerce's decision to ask the question. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

Respondents are incorrect to suggest (NY Br. 25) that the government's position "would effectively preclude anyone from having standing to challenge census decisions that reduce participation." Only theories of injury predicated on unlawful third-party action driven by speculative fears of future unlawful governmental action would be precluded. A plaintiff still would have standing to challenge governmental decisions that "determinative[ly] or coercive[ly]" reduce participation in the census by their own operation, *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997), such as refusing to distribute the questionnaire to certain areas or populations. Cf. *House of Representatives*, 525 U.S. at 324-325. And a plaintiff could challenge governmental decisions that directly modify the enumeration tally and resulting apportionment, as in *Evans*, *House of Representatives*, or *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992) (whether and how to allocate overseas federal employees to States). This case does not involve such circumstances.

Conversely, respondents have no meaningful answer to the government's observation (Gov't Br. 20) that their theory of standing would permit any demographic question on the census to be challenged so long as a group of individuals disproportionately residing in certain States announced their intent to illegally boycott that question. This Court should not permit a heckler's veto to manufacture an Article III controversy in that manner. Cf. *McConnell*, 540 U.S. at 228.

B. Respondents' Arbitrary-And-Capricious Claims Are Not Reviewable Under the APA

The government has explained (Gov't Br. 21-28) that Section 141(a) of the Census Act, 13 U.S.C. 1 *et seq.*, grants the Secretary "virtually unlimited discretion" over the form and conduct of the census, *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996), and that because no judicially manageable standard exists in either the Constitution or the Census Act to evaluate the propriety of demographic questions on the decennial census, the Secretary's decision to include a question about citizenship is "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

In their 132 pages of combined briefing, respondents do not articulate a judicially manageable standard they think should apply to the Secretary's exercise of that discretion. Instead, they simply identify (NY Br. 28; ACLU Br. 25, 27-28) *other* statutory provisions that purportedly constrain the Secretary's discretion to conduct the census. Whether or not compliance with *those* provisions is judicially reviewable under the "not in accordance with law" provision of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), none of them supplies a judicially manageable standard to evaluate whether the Secretary's exercise of his discretion to ask

a demographic question on the decennial census is arbitrary and capricious under the APA. Indeed, the statutory provisions most directly applicable to the content of the census questionnaire pointedly contain no standards at all. See 13 U.S.C. 5 ("The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title."); 13 U.S.C. 141(a) ("The Secretary shall * * * take a decennial census * * * in such form and content as he may determine.").

Rather than identify a standard, respondents simply repeat the refrain that the Secretary must "pursue an *accurate* enumeration." NY Br. 27; see ACLU Br. 29. That is no standard at all, for a court has no way to determine how accurate is accurate enough. Even the district court recognized that "including *any* additional questions on the census—particularly questions on sensitive topics such as race, sex, employment, or health—can serve only to reduce response rates." Pet. App. 421a. Yet there is a venerable tradition of including such demographic questions—including about citizenship—on the decennial census. Indeed, each long form contained *dozens* of demographic questions—such as (in 2000) how the respondent commutes to work, whether she has telephone service, and what type of heating fuel she uses, J.A. 1216, 1219 (2000 long form); or (in 1960) whether the respondent owns a washer and dryer, whether his freezer is detached from the refrigerator, and how many televisions, radios, and air conditioners he owns, Bureau of the Census, U.S. Dep't of Commerce, *Notice of Required Information for the 1960 Census of Population and Housing* 2; see also NY Br.

40 (listing other unusual questions). Neither the Constitution nor the Census Act provides a standard by which a court can judge the propriety of such questions based on their impact on response rates or the accuracy of enumeration. Indeed, "you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1417-1418 (7th Cir. 1992).

To be sure, *Wisconsin* stated that certain decisions about the census must bear "a reasonable relationship to the accomplishment of an actual enumeration." 517 U.S. at 20. But the Court applied that standard in the context of a constitutional challenge to a governmental decision—refusing to apply a statistical adjustment to the census tallies—that would directly modify the enumeration. *Ibid.* That constitutional standard has no applicability to arbitrary-and-capricious reviewability of demographic questions. *Every* demographic question comes at the expense of enumeration; such questions have been included on the decennial census not because they bear a "reasonable relationship" to enumeration, but because they further an entirely different governmental purpose (obtaining valuable information about the populace) notwithstanding their potential impact on enumeration. Invalidating a demographic question about citizenship under the "reasonable relationship" standard logically would require invalidating the demographics questions about sex, age, race, and Hispanic origin too; there is no judicially manageable standard in the Census Act that is capable of distinguishing demographic questions that satisfy the "reasonable relationship" standard from those that do

not. Accordingly, that standard has no bearing on the issue presented here.

Respondents fall back (NY Br. 29; ACLU Br. 28-29) on the legislative history of the 1976 Census Act to claim that it was intended to constrain the Secretary's authority to ask demographic questions. But the language they cite from committee reports (see NY Br. 29; ACLU Br. 29) is about the use of administrative records and sampling under Sections 6(c) and 195, respectively—not about the Secretary's discretion to ask demographic questions on the decennial census questionnaire under Sections 5 and 141(a). Those provisions were enacted, as confirmed by their legislative history (relating to a bill containing exactly the same language as was eventually enacted), to provide the Secretary "greater discretion" to ask questions on "subjects of current national concerns." H.R. Rep. No. 246, 93d Cong., 1st Sess. 14 (1973).

The discretion afforded to the Secretary to "determine" the "form and content" of the census, 13 U.S.C. 141(a), and more specifically to "determine the inquiries, and the number, form, and subdivisions thereof," 13 U.S.C. 5, is thus at least as broad as that granted to the Director in *Webster* v. *Doe*, 486 U.S. 592 (1988), to "terminate the employment" of an agency employee "whenever he shall deem such termination necessary or advisable in the interests of the United States," *id.* at 615-616 (citation and emphasis omitted). And as in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), the Secretary's determination of what demographic information to collect on the census questionnaire requires a "complicated balancing of a number of factors," underscoring its "general unsuitability for judicial review." *Id.* at 831. Respondents' attempts (NY Br. 30; ACLU Br. 25-26) to

distinguish *Webster* and *Chaney* are unavailing. Their near-exclusive reliance on Justice Stevens's concurring opinion in *Franklin* is misplaced not only because a majority of the Court pointedly refused to endorse that concurrence, 505 U.S. at 796-801, but because *Wisconsin* later effectively rejected it altogether in finding that the Constitution and Section 141(a) of the Census Act bestow "virtually unlimited discretion" on the Secretary to conduct the census, 517 U.S. at 19.

Similarly unavailing is respondents' reliance (ACLU Br. 25) on *Bell* v. *New Jersey*, 461 U.S. 773 (1983), and *Chappell* v. *Wallace*, 462 U.S. 296 (1983), for the proposition that the statutory phrase "may determine" is judicially reviewable. Not only do *Bell* and *Chappell* predate this Court's decisions in *Webster* and *Chaney*, but neither case held that there is a freestanding right of judicial review for issues that an agency decisionmaker "may determine." Instead, both of them simply recognized the availability of judicial review on issues for which the governing statute and regulations expressly provided a standard: in *Bell*, whether States misspent federal educational funds on something other than programs "designed to meet the special educational needs of educationally deprived children" in qualifying low-income areas, Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, sec. 205(a)(1), 79 Stat. 30, see *Bell*, 461 U.S. at 791-792; and in *Chappell*, whether it was "necessary to correct an error or remove an injustice" in plaintiffs' military records, 10 U.S.C. 1552(a) (1982), see *Chappell*, 462 U.S. at 303.

C. The Secretary's Decision Was Not Arbitrary And Capricious

Even if there were a judicially manageable standard to determine when a demographic question has rendered the census unacceptably inaccurate, respondents have not shown that the Secretary's decision to reinstate a citizenship question to the decennial census was so irrational as to be arbitrary and capricious. As the government has explained (Gov't Br. 28-40), the Secretary expressly acknowledged the possibility of an undercount, yet determined that because it would be the result of unlawful action, it was outweighed by the benefits of providing the Department of Justice (DOJ) more complete and accurate census citizenship data to aid enforcement of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. V 2017). Under the narrow and deferential standard of review applicable under the APA in general and to the conduct of the census in particular, the Secretary's reasoning is more than adequate. See *Motor Vehicles Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. Like the district court, respondents insist (NY Br. 31-37, 45-51; ACLU Br. 30-41) that using administrative records alone would yield more complete and accurate citizenship information than combining the data from those records with census citizenship data, as the Secretary chose to do. The government has explained (Gov't Br. 31-35) why that is factually incorrect. In documenting the costs of adding the citizenship question, the district court (and now respondents) overlooked a key benefit: obtaining responses from some 22 million people whose citizenship information is not in administrative records, thereby reducing the number of people

for whom citizenship data must be imputed from 35 million to 13.8 million.

Respondents assert (NY Br. 49-51; ACLU Br. 37-38) that it would be more accurate to model or impute citizenship information for those 22 million individuals than to use their self-responses, even though the Census Bureau expects 98% of those self-responses to be accurate, see Gov't Br. 33. Respondents do not actually claim that imputation will surpass 98% accuracy; instead, they assert (ACLU Br. 38) that the 98% accuracy rate is irrelevant because, in their view, "the stated aim of the citizenship question * * * is to accurately *distinguish* noncitizens among the majority-citizen population and locate them." That is incorrect. Neither DOJ nor the Secretary "stated" an aim to "locate" noncitizens. To the contrary, VRA enforcement and redistricting efforts require data on only the total number of citizens (or, to be more precise, the total number of citizens of voting age, sorted by race), with no need to identify who is a citizen and who is not. See *Thornburg* v. *Gingles*, 478 U.S. 30, 42-51 (1982) (describing the principles of VRA § 2).

In any event, respondents cite (ACLU Br. 38) only a small snippet of extra-record testimony to support their assertion that imputation will be more accurate than the self-responses for those 22 million people; they cite no empirical data whatsoever. That is unsurprising, for no such data exists. The Bureau told the Secretary that even though it had "high confidence that an accurate model can be developed and deployed for" imputing citizenship information in the future, it had not yet developed or tested such a model, and that even if it were to develop the model it would "never possess a fully adequate truth deck to benchmark" the model's accuracy.

J.A. 146. For that reason, the Bureau concluded that it "cannot quantify the relative magnitude of the errors across the alternatives at this time." J.A. 148.

In the face of that uncertainty, it was reasonable for the Secretary to choose to rely on self-responses that will be 98% accurate over imputations of unknown accuracy based on models that do not yet exist. That is especially so because those additional 22 million responses —along with the rest of the roughly 294 million self-responses, Pet. App. 56a—could themselves be used to calibrate a "truth deck" to fine-tune the models. See *id.* at 556a. Respondents' assertion that imputing citizenship information for those 22 million people would nevertheless be preferable to soliciting self-responses thus amounts to nothing more than an improper attempt to "substitute [their] judgment for that of the agency." *State Farm*, 463 U.S. at 43.

2. Respondents' remaining quibbles about the completeness and accuracy of census citizenship data are unavailing. For example, citing the estimated 9.5 million self-responses that will contradict citizenship data in administrative records (NY Br. 45-51; ACLU Br. 35-41), respondents reject the obvious solution (Gov't Br. 34) of simply using the latter in the event of a conflict, asserting that this "option was not part of the Secretary's analysis." NY Br. 47; see ACLU Br. 39. Respondents are mistaken. The Bureau made clear to the Secretary *before* he made his decision that it would "revisit[]" its practice of relying on self-responses over contradictory administrative-record data "in the case of measuring citizenship." J.A. 147. The Secretary was thus fully aware that the Bureau did not view the 9.5 million conflicting responses as a significant problem. Nothing in the APA or this Court's precedents requires

an agency decisionmaker to slay every strawman in explaining a decision. Cf. *State Farm*, 463 U.S. at 43 (courts must uphold agency decision, even if "of less than ideal clarity," as long as "the agency's path may reasonably be discerned") (citation omitted).

Respondents also are mistaken to suggest (NY Br. 32-35; ACLU Br. 31-34) that the Secretary overlooked comparison studies concluding that adding a citizenship question to the 2020 census will disproportionately depress response rates among certain demographic groups. In fact, the Secretary expressly acknowledged and discussed those studies, which largely were based on the American Community Survey (ACS). Pet. App. 552a-554a. He simply observed that the limited data available made it impossible to quantify the magnitude of the differential drop in self-response rates that was directly traceable to the citizenship question in particular, especially after correcting for people who already are predisposed to mistrust governmental data collection efforts. *Id.* at 557a-558a. Moreover, as the Secretary observed, there could be many reasons for the differential drop in response rates to the ACS besides just the citizenship question. *Ibid.*; see Oklahoma et al. Amicus Br. 30-33 (describing some possibilities).

Also, an increase in differential nonresponse rates does not necessarily translate into a net differential undercount. Respondents repeatedly cite (NY Br. 10, 22, 48; ACLU Br. 2, 15, 19, 20, 61) an estimate that households containing up to 6.5 million people would not self-respond to the census. That estimate postdated the Secretary's decision and is not in the administrative record; analysis in the administrative record estimated that 630,000 households (containing roughly 1.6 million

people) would not self-respond. Pet. App. 561a. Regardless, the Bureau made clear that nonresponse follow-up (NRFU) operations would substantially, even if not completely, mitigate any potential undercount as a result of those nonresponses. See J.A. 114-115. And the Secretary observed that the anticipated increase in the cost of NRFU operations was "well within the margin of error" that already had been budgeted. Pet. App. 561a. At trial, the Bureau's chief scientist confirmed that there was no evidence of an undercount:

> I do not believe that I have produced or the Census Bureau's produced or any external expert has produced credible evidence, credible quantitative evidence that the addition of a citizenship question to the 2020 census will increase the net undercount or increase the differential net undercounts for identifiable subpopulations. *There's no credible quantitative evidence that the addition of a citizenship question will affect the accuracy of the count.*

11/14/2018 Tr. 1114 (emphasis added). The Secretary thus reasonably concluded that the benefits of obtaining census citizenship data outweighed the potential costs. Pet. App. 562a.

3. Respondents assert (NY Br. 52) that even if the Secretary correctly "identif[ied] each side of the balance," he "d[id] not provide a reasoned explanation for choosing one over the other." That too is incorrect. He understood that citizenship data in administrative records was incomplete, in a different dataset from, and misaligned in time with the other data DOJ used for VRA enforcement (voting-age population and race); that a citizenship question would address those problems; and that any resulting increase in nonresponse rates would be mitigated in part by NRFU operations

and other statistical tools at the Bureau's disposal—and in any event would be the product of an unlawful refusal to fill out the census. See Pet. App. 556a-562a. Weighing these incommensurable factors requires a fundamentally normative policy judgment, and the Secretary explained that he gave greater weight to the benefits, in part because the costs were the result of unlawful conduct. *Id.* at 562a. Respondents might disagree with that judgment, but it was not "so implausible that it could not be ascribed to a difference in view." *State Farm*, 463 U.S. at 43.

Indeed, the Secretary expressly explained that "even if there is some impact on responses" from including the citizenship question, "[t]he citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond." Pet. App. 562a. Particularly given his "virtually unlimited discretion" over the census, *Wisconsin*, 517 U.S. at 19, the Secretary acted rationally and justifiably in concluding that he was not required to capitulate to the equivalent of a heckler's veto when making policy choices about which demographic questions to ask. Setting aside issues of standing, it is inconceivable that an organized bloc could somehow render the inclusion of questions about race or sex arbitrary and capricious merely by credibly threatening a sufficiently large illegal boycott of the census in States that were inclined to bring suit. Respondents' arbitrary-and-capricious challenge to the citizenship question fails for the same reason.

4. Respondents next assert (NY Br. 37-42; ACLU Br. 51-54) that the Secretary's decision was arbitrary

and capricious because he did not follow internal Bureau procedures for pretesting new questions before including them on the decennial census. But this is not a new question. It has been asked, in one form or another, of at least a substantial portion of the population on every decennial census (save one) from 1820 to 2000, and has been asked of some 41 million households on the ACS since its inception in 2005. See Pet. App. 26a-27a. Respondents' assertion (NY Br. 40-41; ACLU Br. 53) that pretesting for the ACS is insufficient pretesting for the decennial census misses the point: the citizenship question was not just *pretested* for inclusion on the ACS, but was *actually included* on the ACS for 15 years—and is materially identical to the question that appeared on (and was tested for) the long form in 2000. Compare Pet. App. 34a (proposed citizenship question) with J.A. 1273 (ACS) and J.A. 1214 (2000 long form). For that reason, the Bureau told the Secretary that no further testing was necessary because it would "accept the cognitive research and questionnaire testing from the ACS." J.A. 108.

Respondents' suggestion (NY Br. 41; ACLU Br. 53) that the question nevertheless had to be retested because it had not performed well on the ACS is meritless. As just mentioned, the Bureau made clear that no further testing was necessary. J.A. 108. Although respondents cite (NY Br. 41; ACLU Br. 53) extra-record trial testimony supposedly to the contrary, in fact that same witness agreed that "the citizenship question performed adequately on the ACS" *for purposes of pretesting* because "41 million households have already been asked that question." 11/14/2018 Tr. 1108. Respondents' second-guessing that conclusion cannot make it

arbitrary and capricious for the Secretary to have accepted the Bureau's assurances that no further testing was necessary.

5. Finally, respondents assert (ACLU Br. 45-51) that the Secretary failed to consider that federal privacy laws permit the Bureau to provide "only citizenship *estimates* at the block level," not "'full count' citizenship information," *id.* at 45 (emphasis omitted), and that in any event citizenship data is not "in fact *necessary*" for "facilitating VRA enforcement," *id.* at 48. Those are strawmen.

First, DOJ did not request "full count" block-level citizenship data in violation of federal privacy laws; that is purely respondents' invention. DOJ requested citizenship data to match the timeframe, scope, and accuracy of the census population data it currently receives from the Bureau. Pet. App. 567a-568a. That population data—which includes age and race information, necessary for VRA enforcement—also is subject to the same privacy laws, and has long been provided as block-level estimates. See J.A. 907, 910. There was no reason for the Secretary to think that DOJ contemplated a departure from this settled practice for citizenship data. Indeed, the Bureau had no trouble recognizing DOJ's request as one for "block-level citizen voting-age population *estimates*." J.A. 105 (emphasis added); see J.A. 290 ("The Department of Justice has requested census block-level citizen voting-age population estimates.").

Nor would those estimates be "materially indistinguishable from the" ACS estimates that "DOJ currently uses" for citizenship data. ACLU Br. 45. To the contrary, unlike ACS data, census-generated block-level estimates of citizenship data would be from the same dataset as, and aligned in time with, the population, age,

and race data currently used for VRA enforcement and redistricting. See Pet. App. 567a-568a. Moreover, the margins of error associated with census and ACS data are fundamentally different: ACS estimates contain "[s]ampling" errors, whereas census estimates contain "nonsampling" errors. J.A. 909. ACS sampling errors are endemic to "statistical estimate[s] based on a statistical sample," *ibid.*, whereas the nonsampling errors in census data include statistical "noise" deliberately "infused" into the data to protect privacy, which (unlike sampling errors) the Bureau is "able to control," J.A. 921-922; see J.A. 915; 11/13/2018 Tr. 1038-1043. Accordingly, the Bureau was confident that it could produce data "fit for use by the Department of Justice" while complying with all privacy requirements. J.A. 922.

Second, DOJ never said that census citizenship data was strictly "necessary" for VRA enforcement; rather, DOJ said it "would be more appropriate" than ACS data, which "does not yield the ideal data" for the four reasons set forth in its formal request. Pet. App. 567a-568a. The government is not prohibited from trying to improve the quality of data used in VRA enforcement and redistricting efforts, and the Secretary was entitled to make the policy judgment that satisfying DOJ's formal request for census citizenship data was a worthy goal. Respondents' intimation (ACLU Br. 49) that the VRA rationale should be discounted simply because the Department of Commerce suggested it to DOJ seems to be premised on the notion—as misguided in the law as it is in life—that a person is incapable of honestly analyzing an issue simply because another person suggested it first.

Relatedly, respondents claim that "'sophisticated modeling' in conjunction with existing [five-year] ACS

data, or with administrative records," would satisfy DOJ's requirements, ACLU Br. 50-51 (citation and footnote omitted), and that using "administrative records alone would resolve DOJ's concerns," NY Br. 44; see *id.* at 42-45. That ignores DOJ's request for citizenship data that aligns in time with, and is from the same database as, census population, race, and age data. See Pet. App. 567a-568a. DOJ expressly identified the rolling ACS estimates as a potential source of error, *id.* at 568a, and the Bureau itself noted that citizenship data in administrative records is incomplete and sometimes outdated. J.A. 117, 120-121; see Project on Fair Representation Amicus Br. 8-11. Respondents' insistence that ACS or administrative records data "is already sufficient for VRA enforcement," NY Br. 45, is nothing more than another attempt to "substitute [their] judgment for that of the agency," *State Farm*, 463 U.S. at 43—in this case, the judgment of both DOJ and the Department of Commerce.

D. The Secretary's Stated Rationale Cannot Be Dismissed As Pretextual

The government has explained (Gov't Br. 40-45) that the district court's finding of what it called "pretext" defies the presumption of regularity and the deferential review mandated by the APA. Specifically, respondents did not show that the Secretary disbelieved his stated reasons, had an unalterably closed mind, or otherwise acted on a legally forbidden basis. Indeed, respondents have not identified any evidence suggesting that the Secretary thought DOJ's analysis in its formal request for citizenship data was anything but genuine.

Instead, citing boilerplate that an agency must "explain the rationale and factual basis" for its decisions,

respondents continue to insist that the Secretary's decision must be set aside merely because he allegedly had additional undisclosed motives for his decision. ACLU Br. 58 (citation omitted); see NY Br. 55. But respondents' cases say only that an agency must identify *some* legitimate and rational basis for its decision—not that it also must reveal every additional motive in the mind of the decisionmaker. See *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962) (agency must "'disclose the basis of its order'" and "make findings that support its decision") (citation omitted); see also *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011) (similar); *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 627 (1986) (similar).

Indeed, a requirement that decisionmakers act free from any additional unstated motives would subject virtually all agency actions to challenge. See *Sierra Club* v. *Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (courts must not turn agency decisionmaking into a "rarified technocratic process, unaffected by political considerations"); cf. 18A375 slip op. 2 (Oct. 22, 2018) (opinion of Gorsuch, J.) (observing that "there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction [and] soliciting support from other agencies to bolster his views"). Respondents remain unable to cite any authority for setting aside agency action based on a facially legitimate and rational reason simply because the decisionmaker might have harbored additional unstated non-invidious reasons for pursuing the decision.

Respondents also assert (NY Br. 57) that the Secretary's decision was pretextual because "DOJ did not exercise independent judgment" in stating its VRA rationale. There is no basis for that assertion. Nothing in

the administrative record—or for that matter in the extra-record evidence—supports the contention that DOJ did not independently analyze the issue and independently conclude that census citizenship data would improve VRA enforcement for the four reasons identified in its letter. See Pet. App. 567a-568a.

E. Section 6(c) Of The Census Act Does Not Provide A Basis To Set Aside The Secretary's Decision

As the government has explained (Gov't Br. 45-48), (1) the Secretary's determination of the "kind, timeliness, quality and scope" of the citizenship data he required is not judicially reviewable, and (2) he opted to use the citizenship data in administrative records to "the maximum extent possible" because he intends to combine it with census citizenship data to fill in the gaps. 13 U.S.C. 6(c).

Respondents do not challenge the first poin See NY Br. 59-61; ACLU Br. 42-43. As to the second, they suggest (NY Br. 60; ACLU Br. 42) that even though citizenship data for 35 million individuals is *missing* from the administrative records, Section 6(c) requires the Secretary to impute their citizenship rather than ask about it on the census. That is incorrect. Nothing in the text of Section 6(c) suggests that it constrains the Secretary's discretion in that manner. Respondents' theory would mean the Secretary's decision to ask the sex and age questions on the census likewise violate Section 6(c), as administrative records have highly accurate and complete information about sex and age—and it is certainly possible to impute missing data on those characteristics.

Indeed, because Section 6(c) applies to all census inquiries, respondents' theory would make the citizenship question unlawful on the ACS too—an absurd result

that would cripple VRA enforcement and redistricting efforts. And respondents' theory would mean the long form violated Section 6(c) too, for administrative records no doubt contained at least partial data about many of the pieces of demographic information requested on that form, too. Congress has given no indication it intended any of those absurd results, either when it enacted Section 6(c) or in the years since.

In any event, the Secretary exercised his discretion to determine that the "kind, timeliness, quality and scope" of data required to satisfy DOJ's request meant providing citizenship data from the same dataset as, and aligned in time with, the census population and race data. See Pet. App. 567a-568a. That constraint cannot be satisfied by citizenship data in administrative records, let alone by imputations from that data for the 35 million people missing from those records.

F. Section 141(f) Of The Census Act Does Not Provide A Basis To Set Aside The Secretary's Decision

For the reasons stated by the government (Gov't Br. 48-53), respondents' claim under Section 141(f) is not judicially reviewable and the Secretary did not violate that provision in any event. Respondents provide no reason to conclude otherwise, as they simply echo the district court's conclusions in a few short paragraphs (NY Br. 61-62; ACLU Br. 43-44) and barely attempt to respond to the government's arguments. And contrary to the United States House of Representatives' assertion at page 14 of its merits-stage amicus brief, Section 141(f) does not "restrict[] the topics and questions on the decennial census to those the Secretary announces to Congress at the prescribed times"; amicus identifies no text in the statute imposing such a restriction, and in

any event the Secretary did alert Congress at the prescribed time that citizenship was both a topic and a question when he submitted his March 2018 report, see Gov't Br. 49, 52-53.

G. The District Court Erred In Authorizing Discovery Outside The Administrative Record

Respondents argue (NY Br. 68) that the "entry of final judgment has largely mooted the parties' discovery dispute," as has their withdrawal of the request to depose the Secretary. If that is true, it would compel a vacatur of the district court's orders under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), because the government would "have been prevented from obtaining * * * review" by circumstances outside of its control, *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (citation omitted), on an issue that independently warranted this Court's review.

In any event, respondents' assertion (NY Br. 68) that extra-record discovery "was justified to uncover objective facts about the decision-making process" confuses the district court's order (Pet. App. 525a-526a) *expanding* the administrative record, which the government does not challenge here, with its orders (*id.* at 437a-451a, 452a-455a, 530a-531a) authorizing discovery *outside* the administrative record to probe the Secretary's mental processes, which requires "a strong showing of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971). Respondents have not made that showing. See Gov't Br. 55; 18-557 Gov't Br. 21-44.

H. The Secretary's Decision Did Not Violate The Enumeration Clause

The district court correctly dismissed (Pet. App. 408a-424a) respondents' Enumeration Clause claims. Under the Constitution, the Secretary's conduct of the 2020 decennial census "need bear only a reasonable relationship to the accomplishment of an actual enumeration." *Wisconsin*, 517 U.S. at 20. Even if that standard could meaningfully be applied the Secretary's exercise of discretion to ask demographic questions, but see p. 7, *supra*, it is easily met here. Every decennial census—including the very first, which sought "a just and perfect enumeration," Act of Mar. 1, 1790, ch. II, § 1, 1 Stat. 101—has included demographic questions, and most of them have included questions about citizenship or place of birth (or both). See Pet. App. 26a-27a, 418a. It would therefore be "absurd," as the district court observed, to find that a demographic question about citizenship violates the Enumeration Clause. *Id.* at 422a. Indeed, given the constitutional nature of the claim, respondents' position would mean that even Congress could not act by statute to reinstate a citizenship question to the decennial census. That, too, would be absurd.

Respondents nevertheless assert that reinstating the citizenship question violates the Enumeration Clause because "it would affirmatively undermine the accuracy of the enumeration." NY Br. 64; see *id.* at 66. As with their arguments on arbitrary-and-capricious reviewability, see pp. 5-9, *supra*, respondents offer no judicially manageable standard to determine precisely how much undermining is required to trigger a violation of the Clause. If this Court finds that the Secretary's decision to reinstate a citizenship question was not arbitrary and capricious, *a fortiori* that decision cannot

have violated the Enumeration Clause. As the district court recognized, *every* demographic question potentially undermines the accuracy of the enumeration for the entirely separate governmental goal of obtaining useful information about the populace. See Pet. App. 418a-422a. Respondents' theory would therefore render every demographic question unconstitutional.

Remarkably, respondents appear to embrace that conclusion, suggesting (NY Br. 66) that even a long-standing demographic question might become unconstitutional because "the modernization of the census process [has] provided a clear scientific understanding of the potential harms to the enumeration of asking particular questions." Yet however much our modern scientific understanding might have progressed, it cannot possibly alter the meaning of the Constitution or constrict the "virtually unlimited discretion" the Secretary has to conduct the decennial census—including by asking demographic questions. *Wisconsin*, 517 U.S. at 19.

Echoing the district court in *California* v. *Ross*, 358 F. Supp. 3d 965 (N.D. Cal. 2019), petition for cert. before judgment pending, No. 18-1214 (Mar. 18, 2019), amicus California argues that "much has changed since 1950 * * * with respect to the Nation's immigration laws," thereby making the citizenship question unconstitutional today. California Amicus Br. 8; see *California*, 358 F. Supp. 3d at 1049 (musing that "the citizenship question may have been perfectly harmless in 1950" and "may be harmless again in the year 2050"). California presumably picked 1950 since that was the last time the citizenship question was asked of every household; but it was on every long form between 1960 and 2000 (including after the last major overhaul of the

Nation's immigration laws, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546)—and the long form also was used for enumerating at least one of every six households. California's theory would make those censuses unconstitutional too. See Pet. App. 421a-423a.

In any event, California's argument appears to be that the constitutionality of a demographic question depends on how other laws, such as the immigration laws, happen to influence the response rate to that question in light of the general political climate at the time. See California Amicus Br. 7-9. This Court should reject that argument. Whatever the correlative relationship between the response rate on a particular census question and *other* laws, it is far more relevant that *the Census Act* encourages people (through coercive penalties and assurances of confidentiality) to respond to all of the questions. See 13 U.S.C. 9(a), 221. Besides, if California is correct that other laws and the general political climate induce fluctuations in the response rates to a given question, then any harm resulting from an undercount would be fairly traceable to those other laws and the political climate—not to the asking of the question. Cf. *Amnesty Int'l*, 568 U.S. at 414-418.

Finally, respondents assert that reinstating the citizenship question violates the Enumeration Clause because it "fulfills no reasonable government purpose." NY Br. 64 (citation omitted). That is incorrect. Even if that standard applies, VRA enforcement and redistricting plainly are reasonable governmental purposes, and the Secretary was entitled to credit DOJ's request for more complete and accurate citizenship data in furtherance of those purposes. Moreover, on this constitutional

question, the Secretary need only provide a rational basis for his decision, cf. *State Farm*, 463 U.S. at 43 n.9—and it cannot have been irrational (and thus unconstitutional) for the Secretary to reinstate a question that the United Nations recommends asking on a census, that most major Western democracies ask on their censuses, and that the United States itself asked on most censuses for 200 years. See Pet. App. 567a. And that is to say nothing of the myriad other demographic questions that always have been included on the census. Taken to its logical conclusion, respondents' theory would mean that every decennial census in our Nation's history, from the first to the last, has been unconstitutional. That cannot be right.

Respectfully submitted.

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Solicitor General

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